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RICHARD W. YOUNG JR.
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

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UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MITCH HIGHTOWER, OXANE "GYPSY"
TAUB, GEORGE DAVIS, RUSSELL MILLS,
and on behalf of all persons similarly situated,
Plaintiff,

vs.

CITY AND COUNTY OF SAN
FRANCISCO, DAVID CHIU in his official
capacity only as President of the Board of
Supervisors of the City and County of San
Francisco, SCOTT WEINER in his official
capacity only as a member of the Board of
Supervisors of the City and County of San
Francisco, and ANGELA CALVILLO, in her
official capacity only as Clerk of the Board of
Supervisors,
Defendants.

Defendant

Case No.:

CLASS ACTION COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF

I. INTRODUCTION

1. This is a challenge to proposed City and County of San Francisco ("City") Ordinance No. 120984 ("Ordinance") which is scheduled to be voted upon by the Board of Supervisors of the City ("Board") at their November 20, 2012 regular meeting.
2. If approved by at least six supervisors present and voting at the November 20, 2012 meeting and signed into law by the Mayor, it would immediately add a new section 154 to San Francisco's Police Code to ban nudity "on any public street, sidewalk,

1 street median, parklet or plaza, or in any transit vehicle, station, platform, or stop of
2 any government operated transit system in the City and County of San Francisco.”

- 3 3. For the reasons set forth in greater detail below, the proposed legislation violates the
4 First and Fourteenth Amendments to the United States Constitution. It is also in
5 excess of the City’s powers under its Charter and Article XI, Sec. 7 of the California
6 Constitution. The proposed legislation impermissibly restricts the free speech and
7 association rights of Plaintiffs and all similarly situated persons as it attempts to
8 criminalize nudity even when engaged in for the purpose of political advocacy.
9 Furthermore, the proposed ordinance violates equal protection as it exempts certain
10 types of speech—i.e. that taking place at City-sanctioned events—from enforcement.
11 Because the Board is proposing to act in excess of its authority and because the
12 Plaintiffs would suffer irreparable injury if the Ordinance becomes law, Plaintiffs are
13 requesting the issuance of a Temporary Restraining Order barring the Defendants and
14 each of them from proceeding with consideration of the Ordinance until this Court
15 can rule on the merits of this Complaint.
16

17 **II. JURISDICTION AND VENUE**

- 18
19 4. This action arises under 42 U.S.C. §1983 and the United States Constitution. This
20 Court has subject matter jurisdiction under 28 U.S.C. §1331 and 28 U.S.C. §1343.
21
22 5. The Defendants are all public officials of the State of California or a political
23 subdivision within the State of California. Each of the Defendants resides within this
24 judicial District and/or performs official duties within the State of California and this
25 Court therefore has personal jurisdiction over each of the Defendants.

1 6. Venue is proper within this District pursuant to 28 U.S.C. §1391(b) in that all of the
2 named Defendants perform their official duties within this District and the events
3 giving rise to this Complaint have occurred or will occur within this judicial District.
4 In accordance with Civ. L.R. 3-2(c), since a substantial amount of the events giving
5 rise to this Complaint took place or will take place within the City and County of San
6 Francisco, in accordance with the Court's Assignment Plan, this case should be
7 assigned to the San Francisco division.
8

9 **III. PARTIES**

10 7. Plaintiff MITCH HIGHTOWER is a resident of the City and County of San
11 Francisco. For the last several years he has organized the annual "Nude-in"
12 demonstration in the area now known as Jane Warner Plaza¹, which draws scores of
13 nudists from the area and around the country, most of whom are in town to attend the
14 Folsom Street Fair, which takes place shortly after the "Nude In" and where they can
15 also appear in the nude if they wish. The "Nude In" is intended to promote a spirit of
16 tolerance, peace and fellowship among the attendees. Mr. Hightower also operates a
17 Web site, bucknakedinpublic.com, which publishes pictures of nudists in public
18 spaces.

19 8. Plaintiff OXANE "GYPSY" TAUB is a resident of Berkeley, California. She has
20 used nudity as an integral part of her political speech, including but not limited to the
21 November 5, 2012 City Operations committee meeting of the Board considering the
22

23 ¹ Jane Warner Plaza is located at 17th Street/Market Street and Castro Street in the City and
24 County of San Francisco, an area within the geographical jurisdiction of this Court. It was
25 opened as a temporary pedestrian plaza closed to vehicle traffic on or about May 13, 2009 and
began its transition to a permanent plaza in 2010. It is named after the late Jane Warner, a
longtime Patrol Special officer who lived and worked in the Castro area.

1 Ordinance, where she disrobed during the public comment portion of the hearing and
2 was physically ejected by San Francisco Sheriff's Deputies for allegedly violating a
3 provision of a claimed Board "dress code". She operates a Web site, mynakedtruth.tv
4 and produces a television program on nude activism, including but not limited to
5 nudity in public spaces.

6 9. Plaintiff GEORGE DAVIS is a resident of the City and County of San Francisco. In
7 2007 he was a candidate for Mayor where he campaigned and debated in the nude as
8 the "nude candidate" and received over 600 votes citywide. He also ran in 2010 for
9 supervisor in District 6, again as the "nude candidate", where he obtained several
10 hundred votes. He also uses nudity as part of his political expression. He is also the
11 author of "Naked Yoga" and "Weapons of Mass Deception", both of which address
12 the practice of nudity. He also maintains the Web sites, urbannudism.com and
13 georgedavisdistrictsix.wordpress.com, both of which use nudity as part of his political
14 activism.

15 10. Plaintiff RUSSELL MILLS is a resident of the City and County of San Francisco. He
16 is a pro-nudity activist who maintains the Web site Naked-truth.net and the online
17 group Fans-of-Urban-Nudism and who uses nudity to campaign against the proposed
18 Ordinance and for other political causes.

19 11. Defendant CITY AND COUNTY OF SAN FRANCISCO is a political subdivision of
20 the State of California.

21 12. Defendant DAVID CHIU is a member of and currently President of the Board. He is
22 sued in his official capacity only. As President of the Board, Mr. Chiu has the power
23 to conduct the meeting and to call or refrain from calling for action on the Ordinance.
24
25

1 13. Defendant SCOTT WEINER is a member of the Board and is sued in his official
2 capacity only. He is the sponsor of the Ordinance and has the power to withdraw it
3 from consideration or to ask that the Board delay consideration of the Ordinance.

4 14. Defendant ANGELA CALVILLO is the Clerk of the Board and is sued in her official
5 capacity only. Her office is responsible for maintaining the records of the Board,
6 creating the agendas for Board meetings and complying with the public noticing
7 requirements under California law.

8 **IV. CLASS ACTIONS ALLEGATIONS**

9
10 15. Plaintiffs bring this action as a class action pursuant to Fed. R. Civ. P. 23(b) (1) or
11 under Fed R. Civ. P. 23(b) (3) on their own behalf and on behalf of all other persons
12 who would be subjected to prosecution if the Ordinance is approved.

13 16. The class is so numerous that joinder is impractical. Between the “Nude In”, the
14 Global Naked Bike Ride, the San Francisco Pride Festival, the Trans March, the Dyke
15 March, Dore Alley and the Folsom Street Fair, approximately several hundred people
16 are nude at various times in public spaces in San Francisco during a typical year.

17 17. The claims of the Plaintiff Class members share common issues of law, including but
18 not limited to whether the challenged proposed ordinance exceeds the power of the
19 Board, whether the challenged proposed ordinance violates the First Amendment on
20 overbreadth grounds and whether the challenged proposed ordinance violates the
21 Equal Protection Clause of the Fourteenth Amendment.

22 18. The claims of the Plaintiff Class members share common issues of fact, including but
23 not limited to whether the proposed Ordinance will be effective at addressing the
24 problem that it is meant to address.
25

1 19. The claims or defenses of the named Plaintiffs are typical of the claims of members
2 of the Plaintiff class because this is a facial challenge to the proposed ordinance. In
3 addition, the claims or defenses of the named Plaintiffs are typical of the claims of
4 members of the Plaintiff class under an “as applied” challenge because the City, by
5 attempting to proscribe long tolerated behavior, has made nudity political expressive
6 speech.

7 20. The named Plaintiffs will fairly and adequately protect the interests of the Plaintiff
8 Class. The named Plaintiffs have no interest that is now or may be potentially
9 antagonistic to the interests of the class. The attorney representing the Plaintiffs is an
10 experienced civil rights attorney admitted to practice in California and Nevada, as
11 well as before the Eighth and Ninth Circuit Courts of Appeal. She should be
12 appointed as class counsel.

13 21. Defendants have threatened to act and will act on grounds generally applicable to the
14 Plaintiff Class, thereby making final injunctive and declaratory relief appropriate to
15 the class as a whole. The Plaintiff class may therefore be properly certified pursuant
16 to Fed. R. Civ. P. 23(b) (2).

17 22. Prosecution of separate actions by individual members of the Plaintiff Class would
18 create the risk of inconsistent or varying adjudications and would establish
19 incompatible standards of conduct for individual members of the Plaintiff Class. The
20 Plaintiff Class may therefore be properly certified, alternatively, under Fed. R. Civ. P.
21 23(b) (1).

22 23. Finally, because the questions of law of law or fact common to class members
23 predominate over any questions affecting only individual members, a class action is
24 superior to other available methods for fairly and efficiently adjudicating the
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1 controversy. Certification is therefore alternatively appropriate under Fed. R. Civ. P.
2 23(b) (3).

3
4 **V. THE ORDINANCE**

5 24. As presently written, the Ordinance would enact a new Section 154 to the San
6 Francisco Police Code (“Code”)² to read as follows:

7 **SEC. 154. PROHIBITING PUBLIC NUDITY.**

8 (a) A person may not expose his or her genitals, perineum, or anal
9 region on any public street, sidewalk, street median, parklet, or
10 plaza, or in any transit vehicle, station, platform, or stop of any
government operated transit system in the City and County of San
Francisco.

11 25. Section (b) of the proposed new Section 154 provides that the Ordinance would not
12 apply to “(1) any person under the age of five years” or to those attending “(2) any
13 permitted parade, fair, or festival held under a City or other government issued
14 permit.”

15 26. Section (c) of the proposed new Section 154 provides for a system of escalating
16 penalties for violating its provisions. A first violation is deemed to be an infraction
17 and punishable by a fine not to exceed \$100. A second violation is also an infraction,
18 but punishable by a fine up to \$200.

19 27. However, Section (d) provides that a third or subsequent conviction within twelve
20 months of the first conviction shall be treated as either “infraction or a misdemeanor”
21 subject to the “the discretion of the District Attorney.” If treated as an infraction, a
22 guilty defendant is to be fined up to \$500, whereas if it is treated as a misdemeanor,
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24
25 ² A copy of the most current version of the ordinance available to the public is attached as
Exhibit 1 and the Plaintiffs respectfully request this Court take judicial notice of its contents.

1 they can be subjected to up to one year in the County Jail, assessed a fine of up to
2 \$500 or both.

3 28. Section (e) provides that the proposed Ordinance does not intend to supersede extant
4 City ordinances regarding nudity, with the exception of Police Code 1071(b) (2).
5 Ironically, the latter statute, which criminalizes the failure of a nudist to sit down in
6 public “without clothing or other separate material as a barrier between his or her
7 genitals, buttocks, or anal region and the public seating” was sponsored by Defendant
8 WEINER in 2011.

9 29. Finally, in Subsection (f) of the proposed Ordinance, the City makes clear that it is
10 attempting to criminalize the mere status of being nude. “A violation of this Section
11 does not require lewd or sexually motivated conduct as required under the indecent
12 exposure provisions of California Penal Code Section 314 or for purposes of California
13 Penal Code Section 290(c).”
14

15 **VI. NEED FOR INJUNCTIVE AND DECLARATORY RELIEF**

16 30. Plaintiffs repeat and re-allege paragraphs 1 through 29 as if fully set forth herein.

17 31. There exists an actual, present and justiciable controversy between Plaintiffs and
18 Defendants concerning their rights and duties with respect to Defendants’ conduct
19 described herein. Plaintiffs contend that Defendants violate Plaintiffs’ rights under
20 the Constitution and laws of the United States, because the challenged Ordinance
21 exceeds the City’s legislative powers and is unconstitutional on its face and as applied
22 to the individual Plaintiffs and to others in the proposed Plaintiff Class. On Plaintiffs’
23 information and belief, Defendants deny that the Ordinance exceeds the City’s
24 legislative powers and their conduct violates Plaintiffs’ rights under the Constitution
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1 and laws of the United States. Plaintiffs fear that they will be subjected to unlawful
2 and unconstitutional actions and seek a judicial declaration that Defendants' conduct
3 deprives Plaintiffs of their rights under the Constitution and laws of the United States.

4 32. This Court may act to restrain the Board from proceeding with further deliberation on
5 the proposed Ordinance if it believes, as Plaintiffs contend, that the Board is acting in
6 excess of its authority in proposing the ordinance because it conflicts, either directly
7 or by implication, with State law, pursuant to O'Connell v. City of Stockton, 41
8 Cal.4th 1061 162 P.3d 583, 63 Cal.Rptr.3d 67 (2007) and Art.XI Sec. 7 of the
9 California Constitution.

10 33. This controversy is otherwise ripe for judicial decision and declaratory relief is
11 necessary and appropriate pursuant to 28 U.S.C. §2201 and 28 U.S.C. §2202, so that
12 the parties may know the legal obligations that govern their present and future
13 conduct.

14 34. In the absence of Court-ordered relief, Plaintiffs will suffer imminent, immediate and
15 ongoing irreparable harm in the form of a chilling of their First Amendment free
16 speech and associational rights. No future award of damages can fully remedy the
17 loss of these constitutional rights. Both the public interest and equity favor granting
18 an injunction to allow Plaintiffs to exercise their constitutional free speech and
19 associational rights and injunctive relief is therefore necessary and appropriate.

20 **VII. COUNT ONE-VIOLATION OF THE FIRST AMENDMENT OF THE**
21 **UNITED STATES CONSTITUTION (42 U.S.C. §1983)**

22 35. Plaintiffs repeat and reallege paragraphs 1 through 34 as if fully set forth herein.

23 36. Section 154(a) of the Ordinance that would ban all nudity in public spaces in the City
24 and County of San Francisco violates the First Amendment rights to free speech and
25

1 association because its provisions are overbroad and impermissibly burden speech
2 without being tailored to the City's stated objectives.

3 37. The mere status of being nude is not and cannot be considered a criminal offense. "It
4 is settled that mere nudity does not constitute a form of sexual 'activity.'... Absent
5 additional conduct intentionally directing attention to his genitals for sexual purposes,
6 a person, as here, who simply sunbathes in the nude on an isolated beach does not
7 'lewdly' expose his private parts within the meaning of section 314." In Re Smith 7
8 Cal. 3d. 362, 366 (1972) [internal citations omitted]; *see also* Manual Enterprises Inc.
9 v. Day 370 U.S. 478, 490, 82 S.Ct. 1432, 8 L.Ed.2d 639 (1962) [photographs of nude
10 individuals did not constitute obscenity]; Sunshine Book Co. v. Summerfield 355
11 U.S. 372, 78 S.Ct. 365, 2 L.Ed.2d 352 (per curiam) (1958) [same result].

12 38. Similarly, it is well settled that activities of nudists are entitled to First Amendment
13 protection as expressive speech. *See generally* Barnes v. Glen Theatre, Inc., 501 U.S.
14 565, 566, 111 S.Ct. 2456 (plurality opinion) (Nude dancing); City of Erie v. Pap's
15 A.M., 529 U.S. 277, 289, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (Nude dancing).

16 39. In the instant case, however, the Plaintiffs as individuals and as representatives of the
17 proposed Plaintiff Class are entitled to an even higher level of protection because
18 their expressive speech as nudists is inextricably intertwined with their political
19 activism, including but not limited to their words and written statements. For
20 example, Plaintiff HIGHTOWER organizes the "Nude In" each year where he
21 expresses his First Amendment right to encourage peace and fellowship among
22 nudists, Plaintiff TAUB runs a blog and a television show where nudity is the central
23 element of her speech and has appeared nude at public events, including but not
24 limited to the November 5, 2012 meeting of the Board's City Operations committee;
25 Plaintiff DAVIS has run for office as a "nude candidate" on several occasions has

1 authored two books promoting nudity and maintains several web sites for nude
2 activism, as does Plaintiff MILLS.

3 40. **The Ordinance contains no exclusion for political speech.** Accordingly, if the
4 ordinance is enacted, all of the Plaintiffs will suffer an improper chilling of their First
5 Amendment rights as they will be unable to be nude in a public space in San
6 Francisco without risking citation by the police and potentially—after the third
7 citation in twelve months—arrest.

8 41. On information and belief of Plaintiffs, Defendants—if the Ordinance becomes
9 law—will act under color of state law to enforce and implement the Ordinance
10 against Plaintiffs and all persons similarly situated, including but not limited to
11 members of the proposed Plaintiff Class, in violation of the Plaintiffs' First
12 Amendment rights.

13 42. As a direct and proximate result of Defendants' unlawful and improper conduct,
14 Plaintiffs will suffer irreparable harm, which will continue absent injunctive relief.

15 **VIII. COUNT TWO-VIOLATION OF EQUAL PROTECTION UNDER THE**
16 **FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION**

17 **(42 U.S.C. §1983)**

18 43. Plaintiffs repeat and reallege paragraphs 1 through 42 as if fully set forth herein.

19 44. Section 154(b) of the Ordinance violates the Equal Protection Clause of the
20 Fourteenth Amendment of the United States Constitution in the two classes of
21 persons it excuses from compliance with the Ordinance. With regard to the first
22 class, the Ordinance directly contradicts state law and is facially invalid. With regard
23 to the second class, the City is attempting to unlawfully discriminate between two
24 similarly situated groups of persons—i.e. attendees at public events who wish to
25

1 appear nude—depending on whether the attendees are at an event which has a City or
2 governmental permit or they are not.

3 45. The first class of persons exempt from the provisions of Sec. 154(b) are persons
4 “under the age of five.” While the Ordinance is punishable by a citation for an
5 infraction³ for the first two offenses, the third can be treated as a misdemeanor at the
6 discretion of the District Attorney.

7 46. While infractions are not punishable by imprisonment, they remain classified as
8 “crimes” under California law. *See* Penal Code §16(3).

9 47. Accordingly, the Ordinance directly violates the provisions of Penal Code §26, which
10 holds that children “under the age of 14, in the absence of clear proof that at the time
11 of committing the act charged against them, they knew its wrongfulness” may *not* be
12 held criminally liable for their acts.

13 48. Because the first exclusion of Sec. 154(b) directly contradicts state law in violation of
14 O’Connell v. City of Stockton, 41 Cal.4th 1061 162 P.3d 583, 63 Cal.Rptr.3d 67
15 (2007) and Art.XI Sec. 7 of the California Constitution, it cannot stand. In addition,
16 because the Ordinance improperly discriminates between two different groups of
17 juveniles (i.e. those between zero and four years of age and those between four and
18 fourteen years of age), it violates the Equal Protection Clause and cannot stand.

19 49. The second exception set forth in Sec. 154(b) provides that persons attending an event
20 for which permits have been issued by the City or another governmental entity, which
21 would presumably include, but not be limited to, the San Francisco Pride Celebration
22 & Parade, the San Francisco Dyke March and the Folsom Street Fair, all of which, on
23

24 ³ Under California law, those charged with “infractions” have no right to either court-appointed
25 counsel (*See* Pen. Code §19.6) or to a trial by jury (*See* Pen. Code §1042.5) because said
infractions are not punishable by imprisonment.

1 Plaintiff's information and belief, are required to obtain permits from the City and/or
2 other governmental entit(ies)⁴, are exempt from prosecution.

3 50. This amounts to a requirement under the Ordinance that an individual, including but
4 not limited to the Plaintiffs and the members of the Proposed Plaintiff Class, must
5 forfeit their free speech rights unless they are willing and able to pay hundreds, if not
6 thousands, of dollars in fees to a legion of City agencies⁵ and potentially wait for up
7 to several weeks to obtain the "right" to use public space⁶ as a "special event"⁷.

8 51. On information and belief of Plaintiffs, Defendants—if the Ordinance becomes
9 law—will act under color of state law to enforce and implement the Ordinance
10 against Plaintiffs and all persons similarly situated, including but not limited to
11

12 ⁴ For example, the Pride parade takes place on Market Street, which organizers need a City
13 issued permit to close, the Dyke March begins in Delores Park, which is under the jurisdiction of
14 the San Francisco Recreation and Park Department, the Folsom Street Fair takes place over
several blocks in the South of Market area near Folsom Street which are also closed to traffic
during the duration of the Fair (and for which organizers need a permit).

15 ⁵ For example, the filing fee just to request a street closure ranges between \$154.00-\$461.00 for a
16 "neighborhood block party" (defined by the San Francisco Municipal Transportation Agency as
a "one block closure in a residential neighborhood with no intersection closures sponsored by a
neighborhood organization or individual who lives on the block to be closed.") to \$509-\$831 for
17 all other events, like a street fair. See "Application for Temporary Street Closure" available at
<http://www.sfmta.com/cms/vclos/documents/SpecialEventStreetClosureApplication612.pdf> (last
18 visited November 13, 2012). Those wishing to use a City park—or premises, like the U.N. Plaza
that aren't obviously parks but still under the jurisdiction of the San Francisco Parks and
19 Recreation Department—must pay a non-refundable \$50 fee, apply *at least 30 days in advance*
of the event (unless the City—in its own discretion—considers the event to be an "Emergency"
20 Event) and then pony up an additional \$750-\$1500. See
<http://www.sfrecpark.org/PermitsAndReservations-SpecialEventFees.aspx> (Last visited
21 November 13, 2012).

22 ⁶ The City appears not to appreciate the irony that the Ordinance would require the public to
obtain a permit to exercise their First Amendment rights in space already dedicated to public use,
23 like streets, medians, sidewalks, parklets and plazas.

24 ⁷ Plaintiffs acknowledge that in some instances, the City can and has issued permits on an
"emergency" basis and/or charged reduced fees or waived fees entirely. However, this does not
25 resolve the issue before the Court. The question is not whether the City may *choose* to obey the
First Amendment, but whether it can be compelled to do so even in situations where it prefers to
take another course.

1 members of the proposed Plaintiff Class, in violation of the Plaintiffs' Rights under
2 the Equal Protection Clause of the Fourteenth Amendment.

3 52. As a direct and proximate result of Defendants' unlawful and improper conduct,
4 Plaintiffs will suffer irreparable harm, which will continue absent injunctive relief.

5 **IX. COUNT THREE-UNLAWFUL PRIOR RESTRAINT IN VIOLATION OF THE**
6 **FIRST AMENDMENT TO THE UNITED STATES CONSTITUTION (42**
7 **U.S.C. §1983)**

8 53. Plaintiffs repeat and reallege paragraphs 1 through 52 as fully set forth herein.

9 54. As set forth above, the Ordinance, if enacted, would provide that nudists who wish to
10 exercise their free speech rights in public spaces like streets and sidewalks would be
11 in danger of being prosecuted for either an infraction or a misdemeanor, depending on
12 how many times they had previously been cited for the offense within the prior
13 calendar year.

14 55. Pursuant to the provisions of the proposed Ordinance, specifically Section 154(b)
15 nudists could escape this Sword of Damocles in only two ways. They could be
16 younger than five years of age, which is not practical for all of the named Plaintiffs
17 and proposed representatives of the Plaintiff Class *or* they could spend several
18 hundred (or several thousand) dollars to a plethora of City agencies to obtain a special
19 event permit *each* time they wanted to exercise their First Amendment right to
20 expressive speech.

21 56. It is well settled that "A permitting requirement is a prior restraint on speech and
22 therefore bears a 'heavy presumption' against its constitutionality." Berger v. City of
23 Seattle 569 F.3d 1029, 1037 (2009) [internal citations omitted], *see also Forsyth*
24

County v. Nationalist Movement, 505 U.S. 123, 130, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992).

57. Accordingly, the Ordinance imposes an unconstitutional prior restraint on the speech of Plaintiffs and all persons similarly situated, including but not limited to the members of the proposed Plaintiff's Class, since a nudist who wishes to engage in protected speech may not do so without risking prosecution under the Ordinance.

58. On information and belief of Plaintiffs, Defendants—if the Ordinance becomes law—will act under color of state law to enforce and implement the Ordinance against Plaintiffs and all persons similarly situated, including but not limited to members of the proposed Plaintiff Class, in violation of the Plaintiff's rights under the First Amendment by imposing an unlawful prior restraint.

59. On information and belief of Plaintiffs, Defendants—if the Ordinance becomes law—will act under color of state law to enforce and implement the Ordinance against Plaintiffs and all persons similarly situated, including but not limited to members of the proposed Plaintiff Class, in violation of the Plaintiffs’ Rights under the Equal Protection Clause of the Fourteenth Amendment.

X. RELIEF SOUGHT

WHEREFORE Plaintiffs, on behalf of themselves and the proposed Plaintiff Class, seek the following relief:

1. A declaration that Sections 154(a)-(f) of the proposed Ordinance are unconstitutional, facially and as applied;
2. A temporary restraining order, preliminary injunction and permanent injunction enjoining Defendants and their officers, agents, servants,

1 employees, attorneys and other persons in active concert or participant with
2 each and every Defendant from enacting and/or enforcing the Ordinance;

3 3. An award of costs and attorney's fees pursuant to 42 U.S.C §1988 and other
4 applicable authority;

5 4. All such and other relief as this Court deems just and proper.

6 Dated this 13th day of November, 2012

7 /S/Christina A. DiEdoardo

8 Christina A. DiEdoardo

9 California Bar No. 258714

10 Law Offices of Christina DiEdoardo

11 Attorney for Plaintiffs

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EXHIBIT 1

[Police Code - Prohibiting Public Nudity]

Ordinance amending the San Francisco Police Code by adding Section 154 to prohibit nudity on public streets, sidewalks, street medians, parklets, and plazas, and on public transit vehicles, stations, platforms, and stops, except as part of permitted parades, fairs, and festivals.

NOTE: Additions are single-underline italics Times New Roman;
deletions are ~~strike-through italics Times New Roman~~.
Board amendment additions are double-underlined;
Board amendment deletions are ~~strikethrough normal~~.

Be it ordained by the People of the City and County of San Francisco:

Section 1. The San Francisco Police Code is hereby amended by adding Section 154, to read as follows:

SEC. 154. PROHIBITING PUBLIC NUDITY.

(a) A person may not expose his or her genitals, perineum, or anal region on any public street, sidewalk, street median, parklet, or plaza, or in any transit vehicle, station, platform, or stop of any government operated transit system in the City and County of San Francisco.

(b) The provisions of this chapter shall not apply to (1) any person under the age of five years or (2) any permitted parade, fair, or festival held under a City or other government issued permit. Notwithstanding this exemption, all persons participating in or attending permitted parades, fairs or festivals shall comply with Section 1071.1(b)(2) of the San Francisco Police Code.

(c) Any person who violates this Section 154 shall be guilty of an infraction and upon conviction thereof such person shall be punished by a fine not to exceed one hundred dollars (\$100) for a first violation, and not to exceed two hundred dollars (\$200) for a second violation within twelve months of the first violation.

(d) Upon the third or subsequent conviction under this Section 154 within twelve months of the first violation, such person shall be guilty of an infraction or a misdemeanor. The complaint charging

1 such violation shall specify whether, in the discretion of the District Attorney, the violation is an
2 infraction or a misdemeanor. If charged as an infraction, upon conviction, the violator shall be
3 punished by a fine not to exceed \$500. If charged as a misdemeanor, upon conviction, the violator
4 shall be punished by a fine not to exceed \$500 or by imprisonment in the County Jail for a period not to
5 exceed one year or by both such fine and imprisonment.

6 (e) This Section shall not supersede or otherwise affect existing laws regulating nudity under
7 the San Francisco Municipal Code, including but not limited to the Park Code, Police Code, and Port
8 Code. But in the event of a conflict between this Section 154 and Police Code 1071.1(b)(2), this
9 Section 154 shall prevail.

10 (f) A violation of this Section does not require lewd or sexually motivated conduct as required
11 under the indecent exposure provisions of California Penal Code Section 314 or for purposes of
12 California Penal Code Section 290(c).

13 Section 2. Severability. If any section, subsection, sentence, clause, or phrase of this
14 Ordinance is for any reason held to be invalid or unconstitutional by a decision of any court of
15 competent jurisdiction, such decision shall not affect the validity of the remaining portions of
16 the Ordinance. The Board of Supervisors hereby declares that it would have passed this
17 Ordinance and each and every section, subsection, sentence, clause, or phrase not declared
18 invalid or unconstitutional without regard to whether any portion of this Ordinance would be
19 subsequently declared invalid or unconstitutional.

20 Section 3. Effective Date. This ordinance shall become effective 30 days from the
21 date of passage.

22 APPROVED AS TO FORM:
23 DENNIS J. HERRERA, City Attorney

24 By: Adine Varah
25 ADINE VARAH
Deputy City Attorney

Supervisor Wiener
BOARD OF SUPERVISORS